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# DANGEROUS DESIRES

Irina Tarnovsky\*

## I. INTRODUCTION

"[I] used to be anorexic. . . . i got to the point where i tried to sweat off excess weight to where i would dress in layers sit on top of a heater with blankets and a heating pad on my stomach as high as it could go . . . i had burns on my stomach for the next week and a half. . . . I'm 5'6 and weight 110 pounds now. i got down to 93 at one point . . . but now I'm beginning to feel like I'm fat."<sup>1</sup> The young woman who wrote this blog entry is one of the estimated seven million American women affected by an eating disorder.<sup>2</sup>

Eating disorders refer to a group of conditions, which involve either insufficient or excessive food intake.<sup>3</sup> The primary sufferers are adolescent women<sup>4</sup> and "since the 1960s,

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1. sallyjoe25, *Scary*, EXPERIENCE PROJECT (Nov. 9, 2009), <http://www.experienceproject.com/stories/Am-A-Former-Anorexic/777793> (typographical errors in original).

2. *Eating Disorder Statistics*, S.C. DEPT MENTAL HEALTH, <http://www.state.sc.us/dmh/anorexia/statistics.htm> (last visited Feb. 6, 2013).

3. NAT'L INST. MENTAL HEALTH, *EATING DISORDERS 1* (2011) *available at* <http://www.nimh.nih.gov/health/publications/eating-disorders/complete-index.shtml> (last visited Nov. 16, 2011).

4. See Sara B. Cohen, *Media Exposure and the Subsequent Effects on Body Dissatisfaction, Disordered Eating, and Drive for Thinness: A Review of the Current*

eating disorder incidence rates have doubled.”<sup>5</sup> Eating disorders are caused by a number of factors including: cultural practices that glorify thinness and place value on obtaining the “perfect body,” depression, perfectionism, and outside pressures for girls to become “perfect.”<sup>6</sup>

As apparent from the blog entry cited above, these diseases and conditions are often longtime battles for their sufferers, and fears of relapses are prevalent.<sup>7</sup> Eating disorder sufferers can, and do, encounter serious consequences, including death.<sup>8</sup> In fact, it has been reported that “[e]ating disorders have the highest mortality rate of any mental illness.”<sup>9</sup> Additionally, “[t]he mortality rate associated with anorexia nervosa [just one type of eating disorder] is 12 times higher than the death rate of ALL causes of death for females 15 – 24 years old.”<sup>10</sup>

The high death rate among young women is associated with the fact that eating disorders commonly begin during the transition periods of one’s adolescent years.<sup>11</sup> As a young woman begins to transition from childhood into adolescence, it becomes increasingly clear to her that “[a]ttractiveness is an important component of . . . [her] success.”<sup>12</sup> In this regard, this article will expose the link between the media’s use of unnaturally thin women in advertising and eating disorders in adolescent girls. As a possible solution to the occurrence of eating disorders, this article proposes government regulate the

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Research, 1 MIND MATTERS: WESLEYAN J. PSYCHOL. 57, 57 (2006).

5. *Id.* (citing Eating Disorders Coalition, 2006).

6. *Id.* at 65.

7. *Eating Disorder Relapse*, EATING-DISORDER.ORG, <http://www.eating-disorder.org/eating-disorder-relapse> (last visited Jan. 24, 2012).

8. NAT’L INST. MENTAL HEALTH, *supra* note 3, at 1.

9. S.C. DEP’T MENTAL HEALTH, *supra* note 2.

10. *Id.*

11. Kathleen M. Pike & Denise E. Wilfley, *The Changing Context of Treatment, in THE DEVELOPMENTAL PSYCHOPATHOLOGY OF EATING DISORDERS: IMPLICATIONS FOR RESEARCH, PREVENTION, AND TREATMENT* 365, 366 (1996).

12. Linda Smolak & Michael P. Levine, *Adolescent Transitions and the Development of Eating Problems, in THE DEVELOPMENTAL PSYCHOPATHOLOGY OF EATING DISORDERS: IMPLICATIONS FOR RESEARCH, PREVENTION, AND TREATMENT* 207, 217 (1996).

advertisements used in teen magazines, so that the magazines are unable to use digitally altered or unnaturally thin women in their advertising. Finally, the remainder of the piece will provide a number of legal justifications that may be employed to warrant regulation of these loathsome advertisements.

## II. THE NEED FOR REGULATIONS IN TEEN MAGAZINES

This article aims to encourage government regulations on the types of advertisements that can be published in teen magazines. To be clear, this article is *not* advocating global regulations on all magazines since this would conflict with the First Amendment's protection of speech.<sup>13</sup> However, it is likely that due to the increased vulnerability associated with teen girls, who are the primary readers of teen magazines, that regulations on the types of advertisements appearing in *teen magazines* would be upheld by the Court. Specifically, this is because of, but not limited to, the following factors: the increased vulnerability associated with teen girls,<sup>14</sup> the clear correlation between the viewing of unnaturally thin women in advertisements and eating disorders in teen girls,<sup>15</sup> and the Court's desire to protect the well-being of American youth.<sup>16</sup>

### CHARACTERISTICS OF TEEN MAGAZINES

Teen magazines are specific magazines created for the adolescent; however, they are primarily aimed at teen girls.<sup>17</sup> These magazines are very popular among teen girls, and there

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13. After examining the Court's attitude towards the regulation of advertisements as a whole, it appears clear that the Court would probably *not* allow regulations to be implemented on advertisements that appear in all magazines. *Va. State Bd. Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 780 (1976) (explaining that advertisements are protected by the First Amendment).

14. See discussion *infra* *Correlation Between Teen Magazines and Disordered Eating*.

15. See discussion *infra* *Correlation Between Teen Magazines and Disordered Eating*.

16. See discussion *infra* Section II.

17. *Teen Magazines*, MAGFORUM.COM, <http://www.magforum.com/glossies/teen.htm> (last visited Feb. 6, 2013).

are many of them. Specific magazines that rank among the top ten include, *American Cheerleader Magazine*, *Girls' Life Magazine*, *J-14 Magazine*, *M Magazine*, *Popstar! Magazine*, *Seventeen Magazine*, *Teen Vogue*, *Teen Voices Magazine*, and *Twist Magazine*.<sup>18</sup> Currently, *Seventeen Magazine* is offering a three-year subscription for just fifteen dollars.<sup>19</sup>

These magazines, and the advertisements contained within them, commonly feature rail-thin models. Until the 1960s, rail-thin models were seen in the media only occasionally.<sup>20</sup> However, in today's culture these models are commonplace. Today, magazines contain celebrities to portray the "ideal"<sup>21</sup> and often include photographs of celebrities such as Julia Roberts, Cameron Diaz, and Diana Ross, all of whom already "meet the Body Mass Index<sup>22</sup> physical criteria for Anorexia."<sup>23</sup> These magazines depict an "ideal" body fashion model that typically weighs twenty-three percent less than the average woman.<sup>24</sup> In fact, "most of these supermodels and actresses [used in these advertisements] are so unnaturally thin that they [are at] risk [of] infertility, osteoporosis and, ultimately, kidney damage."<sup>25</sup>

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18. *Top 10 Teen Magazines*, ALLYOUCANREAD.COM, <http://www.allyoucanread.com/top-10-teen-magazines> (last visited Oct. 31, 2011).

19. *Best Gifts Under 20*, SEVENTEEN, <http://www.seventeen.com/fun/gifts-under-20/three-years-of-seventeen> (last visited Oct. 31, 2011).

20. *Media Influence*, RADAR PROGRAMS, <http://www.raderprograms.com/causes-statistics/media-eating-disorders.html> (last visited Feb. 6, 2013).

21. In this article, "ideal" will refer to the ideal that is advertised in teen magazines by using unnaturally thin models and celebrities with digital alterations.

22. *Body Mass Index*, CTRS. FOR DISEASE CONTROL & PREVENTION (last updated Sept. 13, 2011), <http://www.cdc.gov/healthyweight/assessing/bmi> ("Body Mass Index (BMI) is a number calculated from a person's weight and height. BMI provides a reliable indicator of body fatness for most people and is used to screen for weight categories that may lead to health problems.").

23. *Media Influence*, RADAR PROGRAMS, <http://www.raderprograms.com/causes-statistics/media-eating-disorders.html> (last visited Feb. 6, 2013).

24. *Body Image*, EATING DISORDERS, [http://www.eatingdisordershelpguide.com/body\\_image.html](http://www.eatingdisordershelpguide.com/body_image.html) (last visited Sept. 14, 2012).

25. Hilary Rowland, *Obsessed With Thin*, URBANETTE, <http://www.urbanette.com/obsessed-with-thin-media-gone-too-far/> (last visited

More troubling is the fact that these advertisements do not publish the *already* unnaturally thin models and celebrities the way that they are in reality; instead, they alter their photos and create airbrushed and edited images of unnatural and unattainable features.<sup>26</sup> Unfortunately, as a result, many young girls believe that looking like these celebrities, which may only be possible with the use of technology, is a prerequisite to being successful and beautiful.<sup>27</sup>

### CORRELATION BETWEEN TEEN MAGAZINES AND DISORDERED EATING

Since these magazines are abundant and readily accessible, it is appropriate to examine the effects of viewing unnaturally thin models and celebrities on teens. Various studies have been conducted to determine the effects that reading teen magazines has on teen girls. One such study surveyed the effects of reading teen magazines over a period of fifteen months.<sup>28</sup> After the subscription period, some viewers, who already had low levels of social support, began dieting and exhibiting symptoms associated with eating disorders.<sup>29</sup>

Another study used a survey method to examine the effect of teen magazines on adolescent girls.<sup>30</sup> The survey asked teen girls to describe their notion of an "ideal girl."<sup>31</sup> The majority of responses "described the 'ideal girl' as being 5'7", 100 pounds,

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Feb. 6, 2013).

26. M. GIGI DURHAM, *THE LOLITA EFFECT* 97 – 98 (2008).

27. See Dan Ziemba, *Representation of Women in Television Commercials: How Are Women Affected By This?*, <http://people.cohums.ohio-state.edu/carmack8/english110c/analysis.htm> (last visited Nov. 2, 2011).

28. See Kimberley K. Vaughan & Gregory T. Fouts, *Changes in Television and Magazine Exposure and Eating Disorder Symptomatology*, 49 *SEX ROLES* 313, 314 (2003).

29. *Id.* at 316 – 17.

30. Michael P. Levine & Linda Smolak, *Media as a Context for the Development of Disordered Eating*, in *THE DEVELOPMENTAL PSYCHOPATHOLOGY OF EATING DISORDERS: IMPLICATIONS FOR RESEARCH, PREVENTION, AND TREATMENT* 235, 235 (1996) (citing Mark Nichter & Mimi Nichter, *Hype and Weight*, 13 *MEDICAL ANTHROPOLOGY* 249 (1991)).

31. *Id.*

size five, with long blonde hair and blue eyes.”<sup>32</sup> Coincidentally, this is the same type of girl who typically appears in magazine advertisements. Another survey study reported that reading fashion magazines influenced sixty-nine percent of young girls’ perceptions of the perfect body type.<sup>33</sup> Additionally, forty-seven percent of these girls reported that the pictures influenced them to want to diet and lose weight.<sup>34</sup>

These studies represent only a small handful of the larger mass of studies that conclude that there is a positive correlation<sup>35</sup> between viewing pictures in teen magazines and body dissatisfaction.<sup>36</sup> The occurrence of disordered eating is associated with the viewing of advertisements contained in teen magazines because the depiction of an “ideal” woman is unrealistic within these magazines.

### THE HEALTH EFFECTS OF EATING DISORDERS

To specify just how great an evil eating disorders are to teen girls, it appears relevant to discuss the specific side effects affiliated with eating disorders. Eating disorders are typically grouped into three different diseases.<sup>37</sup> Anorexia nervosa is a

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32. *Id.*

33. Alison E. Field et al., *Exposure to the Mass Media and Weight Concerns Among Girls*, 103 *Pediatrics* e36, e39 (1999) *available at* <http://www.pediatricsdigest.mobi/content/103/3/e36.full.pdf+html>.

34. *Id.* at e39 – e40.

35. It is important to note that correlation does not equate to causation. Studies have suggested that viewing pictures in teen magazines and body dissatisfaction have some sort of relationship. However, this does not mean that media images definitively cause body dissatisfaction.

36. See *The Impact of Media Images on Body Image and Behaviours: A Summary of the Scientific Evidence*, NAT’L EATING DISORDERS ASS’N, *available at* <http://www.scribd.com/doc/22736615/The-Impact-of-Media-Images-on-Body-Image-and-Behaviours-A-Summary-of-the-Scientific-Evidence>

(summarizing scientific studies regarding the effect of the media on body image). To be clear, body dissatisfaction is seen as a serious problem, and should not be underestimated. In fact, research shows that body dissatisfaction is a powerful, potent, and consistent precursor of a whole range of unhealthy body-related behaviors. See *id.* These unhealthy behaviors include: unhealthy eating regimes, problematic eating behavior, as well as eating disorders. *Id.*

37. NAT’L INST. MENTAL HEALTH, *supra* note 3, at 2 – 4.

disease caused by intentional starvation.<sup>38</sup> Bulimia nervosa involves consuming large amounts of food and “ridding” the body of the calories, through intentional vomiting, abuse of laxatives, enemas, or obsessive exercise.<sup>39</sup> Lastly, binge eating is a disease categorized by episodes of uncontrolled eating.<sup>40</sup>

The harm associated with Anorexia Nervosa “can result in organ compromise and heart and kidney failure; [with] 90% of sufferers end[ing] up with bone loss.”<sup>41</sup> Due to the starvation, the body begins to lack nutrition, vitamins, minerals, and electrolytes and it “compensate[s] in part by lower[ing] resting and total metabolism, and [the body accomplishes this] through hormone changes such as decreas[ing] thyroid and insulin.”<sup>42</sup> The results of this can be fatal, “[a]s the body is starved, the muscles are starved” and muscle deterioration can lead to heart failure.<sup>43</sup> Additionally, low levels of minerals can produce sudden death due to abnormal heart rhythms.<sup>44</sup>

The harm associated with bulimia nervosa can cause its sufferers to “experience muscle cramps, heartburn, fatigue, bloody diarrhea, fainting episodes, dizziness, abdominal pain,” and gastrointestinal problems, all of which may become life threatening.<sup>45</sup> Again, as with anorexia, the lack of electrolytes can cause abnormal heart rhythms, which can be fatal.<sup>46</sup>

There appears to be a clear link between viewing teen magazines and the prevalence of eating disorders. Thus, as many others have stated:

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38. *See id.* at 2.

39. *Id.* at 3.

40. *Id.* at 4.

41. Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1046 (2009) (citing Steven Grinspoon et. al., *Prevalence and Predictive Factors for Regional Osteopenia in Women with Anorexia Nervosa*, 133 ANNALS INTERNAL MED. 790, 793 (2000)).

42. *Overview of Teenager Eating Disorders*, PALO ALTO MED. FOUND., <http://www.pamf.org/teen/life/bodyimage/eating-disorders.html> (last visited Dec. 17, 2012).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*



Both peers and popular culture, independent of each other, exert influence on girls' weight control beliefs and behaviors. Therefore, to make eating disorder prevention programs more effective, efforts should be made to persuade the television, movie, and magazine industries to employ more models and actresses whose weight could be described as healthy, not underweight.<sup>47</sup>

This article hopes to do just that – persuade society that magazines may be regulated, and how. However, those who support teen magazines in the form that they exist today argue that they have a First Amendment right to advertise in whichever way that they choose. If, however, regulations were to be implemented to prohibit advertisements from using unnaturally thin women and to encourage using women of average weight instead, this article argues that the Supreme Court would likely uphold these regulations. This is primarily due to the Court's willingness to rule in the best interest of the children. The next part of this article will explain how the health and well-being of children can trump the First Amendment.

### III. CHILDREN AND THE FIRST AMENDMENT

This article aims to regulate only one aspect of the media: advertisements contained within teen magazines. Arguably, readers of teen magazines will be exposed to unnaturally thin models and celebrities on television, and even in other women's magazines. However, due to the nature of the content in teen magazines and the fact that teen girls are the primary readers, these magazines should not continue contributing to the cultivation of eating disorders. Therefore, these magazines require exclusive regulations.

The positive correlation between eating disorders and the viewing of unnaturally thin women in advertisements comes mainly from the fact that "children are uniquely vulnerable to

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47. Field et al., *Relation of Peer and Media Influences to the Development of Purging Behaviors Among Preadolescent and Adolescent Girls*, 153 ARCH. PEDIATR. ADOLESC. MED. 1184, 1184 (1999).

the effects of advertising.”<sup>48</sup> Interestingly, the Supreme Court, within its interpretation of the First Amendment, has addressed the vulnerabilities of children.<sup>49</sup> Therefore, if regulations were to be implemented to prevent advertisements and magazines from picturing unnaturally thin women as “ideal,” the Court will likely consider the vulnerabilities of children in its evaluation, when determining the constitutionality of such regulations.

The Supreme Court has made it clear that the protections of the First Amendment may not apply with equal force to minors as they do to adults. Some cases have held that children may not make the same constitutionally protected decisions afforded to adults because children have a lesser right.<sup>50</sup> In other cases, the Court simply allows the government greater regulatory power in situations that concern children.<sup>51</sup>

One such case is *Prince v. Massachusetts*, 321 U.S. 158 (1944). In *Prince*, a young girl preached and sold magazines on a public street in violation of relevant law.<sup>52</sup> In its opinion, the Court made it clear that a statute such as the one contained in *Prince* would fail if it were made applicable to adults, because it would be in violation of the First Amendment’s freedom of religion.<sup>53</sup> However, the Court upheld the statute, explaining that the State’s authority over children’s activities is broader and covers

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48. Jennifer L. Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade Commission Has The Constitutional and Statutory Authority to Regulate*, 38 J.L. MED. & ETHICS 98, 98 (2010).

49. See, e.g., *N.Y. v. Ferber*, 458 U.S. 747, 776 (1982) (explaining that the Court will consider the harmful effects to children, and that using children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child); See, e.g., also *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (involving the sale of “obscene” magazines to a minor and a discussion of the “well-being” of children).

50. See generally *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding a Massachusetts statute which made it illegal for a boy under the age of twelve, or a girl under the age of eighteen to sell, expose, or offer for sale any newspapers, magazines, periodical or any other articles of merchandise of any description. It also made it illegal for these minors to exercise the trade of bootblack or scavenger, or any other trade, in any street or public place).

51. See generally *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding the ability of the government to regulate magazine sales so as to protect children).

52. *Prince*, 321 U.S. at 162.

53. *Id.* at 167.

more than its authority over adults.<sup>54</sup> To instill its point, the Court went on to say that "the mere fact a state could not wholly prohibit this form of adult activity . . . does not mean it cannot do so for children."<sup>55</sup>

The idea that the Supreme Court will go to greater lengths when it comes to the protection of children is vital to the issue of regulating advertisements contained in teen magazines. If the Court is provided the statistical information that correlates the existence of eating disorders with the viewing of teen magazines, it may examine the dangers because it involves the welfare of children whom, it has determined, need extra protection.

Alternatively, however, the Court has also decided that it will not reduce the *entire* adult population to reading only what is suitable for children.<sup>56</sup> Thus, this article aims to impose regulations on only the advertisements contained within teen, rather than global, magazines. Since teen magazines are primarily aimed at teen girls, and teen girls are almost the exclusive readers of these magazines, the regulations would not "reduce the adult population . . . to reading only what is fit for children."<sup>57</sup>

The Supreme Court is willing to protect children from undesirable material. For example, in *Ginsberg v. New York*, 390 U.S. 629 (1968) the Court upheld the constitutionality of a statute that made it illegal for an adult to sell or distribute pornographic magazines to minors.<sup>58</sup> The Court explained, "[b]ecause of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring

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54. *Id.* at 168.

55. *Id.*

56. See *Butler v. Michigan*, 352 U.S. 380, 383 – 84 (1957) (finding a Michigan statute unconstitutional that prevented the general distribution of books to the public because of the undesirable influence the books may have had on the youth. As a result, adult literature is not subjected to obscenity tests that may be imposed on children's literature.).

57. *Id.* 383.

58. *Ginsberg v. New York*, 390 U.S. 629, 647 (1968).

the distribution to children of books recognized to be suitable for adults.”<sup>59</sup> The Court also discerned that what is considered “obscene” for adults may not be the same for children.<sup>60</sup> Accordingly, since advertisements in teen magazines negatively affect a minor’s health, safety, and welfare, the state has the power to regulate them.

Another example of the Court’s willingness to protect children from undesirable material can be found in *F.C.C. v. Pacifica*, 438 U.S. 726 (1978). In *Pacifica* a George Carlin monologue that contained “filthy words” was aired on the radio during the afternoon.<sup>61</sup> The Court explained that the monologue was considered speech within the meaning of the First Amendment.<sup>62</sup> However, the Court held that the contents of the monologue could be regulated due to *children’s* ability to obtain access to broadcast material during the daytime hours.<sup>63</sup> This access, coupled with the government’s interest in the welfare of minors was the justification provided by the Court for upholding regulations.<sup>64</sup>

The *Pacifica* decision came before the time of the Internet; however, even at that time, the Court focused on the availability and accessibility of the radio to children. With today’s technological advances, teen magazines are widely available and accessible to children. The accessibility factor, as the Court described it in *Pacifica*, is now much larger than ever before. Now, teen girls can obtain access to these magazines very easily. In fact, teens can browse teen magazines with just a click of a button over the Internet or by purchasing an “app” for an iPhone or iPad.<sup>65</sup> Accordingly, access to these magazines is no

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59. *Id.* at 636.

60. *Id.* (“In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.”).

61. *F.C.C. v. Pacifica*, 438 U.S. 726, 729 – 30 (1978).

62. *Id.* at 744.

63. *Id.* at 749 – 50.

64. *Id.* at 731, 749.

65. See, e.g., *Seventeen Magazine*, ITUNES.APPLE.COM, <https://itunes.apple.com/us/app/seventeen-magazine/id452322504?mt=8> (last visited

longer restricted to obtaining the hard copies.

Downloading a teen magazine off the Internet, or by using an app on an iPhone or iPad, provides teens with much greater exposure to teen magazines than ever before. Given the greater exposure and accessibility,<sup>66</sup> along with the state's interest in protecting children from the reported harmful effects of these advertisements,<sup>67</sup> the Court may likely uphold regulations of advertisements in teen magazines.

The preceding cases prove that the Court has given the government a much greater amount of deference when it comes to the regulation of materials that are made and distributed for children. Since teen magazines are made and distributed primarily for teen girls, the government should be given the deference needed to regulate the advertisements contained within these magazines. The health and welfare of these young girls is at stake, and these advertisements should not continue to promote and encourage unhealthy behaviors that lead to eating disorders in young girls.

#### IV. A NEW CATEGORY OF UNPROTECTED SPEECH

The advertisements contained in teen magazines are currently considered protected speech within the meaning of the First Amendment; however, the Supreme Court has held certain categories of speech to be so harmful and lacking in value that they are unworthy of First Amendment protection.<sup>68</sup> In opinions which place speech outside of the First Amendment, the Court has expressed that although, as a general matter, government has no power to restrict our freedoms of speech "there are certain well-defined and narrowly limited classes of speech, [for which] the prevention and punishment . . . have never been

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66. See *Pacifica*, 438 U.S. at 749 (explaining that because children can easily access the broadcast, the programs can be regulated).

67. *Ginsberg v. NY*, 390 U.S. 629, 639 – 40 (describing the State's interest in regulating materials that are suitable for children).

68. Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 844 – 45 (2005).

thought to raise any Constitutional problem.”<sup>69</sup>

While describing the classes of speech which are not given Constitutional protection, the Court eludes to the principle that unprotected speech lacks any essential part of the exposition of ideas.<sup>70</sup> Furthermore, it states that the speech has “such slight social value . . . that any benefit that may be derived from . . . [such speech] is clearly outweighed by the social interest in order and morality.”<sup>71</sup>

It is valuable to study and interpret the justifications used to hold a category of speech unprotected so as to determine whether the Court will also deem advertisements in teen magazines a new category of unprotected speech. This article will first discuss the Court’s justifications for banning obscenity and fighting words, as these two categories of speech outline what appears to be two major justifications underlying free speech law. Second, it will propose that advertisements in teen magazines present similar harms to obscenity and fighting words, without falling into those prescribed categories; thus, advertisements in teen magazines should be a new category of unprotected speech.

In *Roth v. United States*, 354 U.S. 476 (1957) the Supreme Court first held obscene speech to be outside of the protections of the First Amendment.<sup>72</sup> The Court held that the speech had little to no value because it lacked even the slightest social importance.<sup>73</sup> However, since *Roth* obscenity law has evolved and it is now defined by a three-prong test:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the

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69. *Miller v. California*, 413 U.S. 15, 20 (1973) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 – 72 (1942)).

70. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

71. *Id.* (citing Chafee, *FREE SPEECH IN THE UNITED STATES* 150 (1941)).

72. *Roth v. United States*, 354 U.S. 476, 485 (1957).

73. *Id.* at 484.

work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>74</sup>

As a result, speech that fits within this three-prong test is not afforded the protections of the First Amendment.

Upon examining the history of obscenity regulation, there appears to be a desire and aspiration in American culture for holiness and propriety.<sup>75</sup> The justifications provided for not protecting this form of speech point to an element of "disgust," and an attitude concerning a standard in which a "decent" community and a "decent" man cannot tolerate speech that is obscene.<sup>76</sup> As such, much obscenity is suppressed because it is in the best interest and welfare of the community.

Likewise, advertisements contained in teen magazines do not serve the best interest of the community, and certainly are not in the best interest of the children who are the target audiences. These advertisements have no redeeming value. Rather than encouraging education, self-acceptance, or healthy forms of exercise, these magazine advertisements are composed of headlines such as: "*Get Your Best Body By New Year's, And Still Eat What You Want, What His Kiss Really Means, and Party Outfits for Your Body: Flaunt Your Favorite Feature.*"<sup>77</sup> In an effort to promote these headlines, the advertisements then feature digitally altered photos of celebrities and models, thereby exposing impressionable teen girls to a body type attainable only with the help of photo editing software.<sup>78</sup> Instead of focusing on promoting a healthy lifestyle in young girls, readers are bombarded with messages emphasizing the importance of appearance.

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74. *Miller v. California*, 413 U.S. 15, 24 (1973).

75. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 393 (1963).

76. *Id.* at 394.

77. Margarita Tartakovsky, *Minding the Media: Teen Magazines*, PSYCH CENTRAL BLOG (last reviewed Dec. 14, 2008), <http://psychcentral.com/blog/archives/2008/12/14/minding-the-media-teen-magazines/> (listing headlines similar to womens magazines).

78. *AMA Adopts New Policies at Annual Meeting*, AM. MED. ASS'N (June 21, 2011), <http://www.ama-assn.org/ama/pub/news/news/a11-new-policies.page>.



The advertisements prey on the fact that adolescence is a vulnerable time of identity formation in young women.<sup>79</sup> A “decent” community would expect advertisement creators to keep this in mind instead of creating unattainable advertisements specifically designed to attract teen girls. Therefore there is no redeeming value in publishing an airbrushed ideal that leads some girls to “despise themselves and their bodies.”<sup>80</sup>

Equally valueless, teen girls routinely fall vulnerable to the “ideals” in these photos, prompting failed attempts by teens to mimic these unattainable levels of slimness.<sup>81</sup> As a result they find themselves victims of eating disorders.<sup>82</sup> As the Court explained in *Prince*, “[i]t is [in] the [best] interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.”<sup>83</sup>

Like obscenity, fighting words are also outside the parameters of the First Amendment. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court deemed fighting words another form of speech for which there should be no Constitutional protection.<sup>84</sup> The analysis in *Chaplinsky* was led by the Court’s description of the weighing of social value and truth against order and morality.<sup>85</sup> The test to determine whether speech falls within the scope of “fighting words” asks the Court to consider whether the speech is “likely to cause an average addressee to fight.”<sup>86</sup> Therefore the justifications behind the prohibition of fighting words appears to be one of public policy, as well as a general desire by the Court to promote a

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79. See discussion *supra* Section II.

80. Jennie Dalcour, *The Negative Effects of Teen Magazines*, [http://www.ehow.com/list\\_7769492\\_negative-effects-teen-magazines.html](http://www.ehow.com/list_7769492_negative-effects-teen-magazines.html) (last visited Jan. 13, 2011).

81. See discussion *supra* Section II.

82. See discussion *supra* Section II.

83. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

84. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 – 72 (1942).

85. *Id.* at 572.

86. *Id.* at 573.



peaceful society.

In *Chaplinsky*, the welfare of the addressee of the fighting words was deemed important enough to define a new category of speech. This was likely due to the harm that could have come to the addressee, and the Court's desire to promote peace. Surely, if the harm to a single man was of enough interest to deem the speech outside the protections of the First Amendment, then the protection and the physical welfare of seven million young women living in America should also be enough.

Based on the findings discussed earlier, the advertisements contained in teen magazines cannot be categorized by the Court as in the "best interest of the children," since they have led teen girls to engage in dangerous behaviors to their health.<sup>87</sup> Therefore, magazine advertisements, as they appear today, should be deemed another form of unprotected speech. A "decent" community should not tolerate this form of speech since it is clear the advertisements are valueless and encourage harmful behavior in young women.

## V. ADVERTISEMENTS IN TEEN MAGAZINES ARE UNLIKE VIDEO GAMES

In June 2011, the Court in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011) decided a California law imposing restrictions on violent video games was a violation of the First Amendment.<sup>88</sup> Because the Court refused to create a new category of unprotected speech under which violent video games would fall, the statute at issue was found to be unconstitutional.<sup>89</sup> Although some of the justifications provided by the government in *Brown* mirror the justifications provided by this article, there are several reasons why the Court's refusal to promote a new category of unprotected speech in *Brown*

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87. See discussion *supra* Section II.

88. *Brown v. Entm't Merchs. Ass'n et al.*, 131 S. Ct. 2729, 2741 – 42 (2011).

89. *Id.* at 2741 – 42.

should not preclude it from creating a category for advertisements contained in teen magazines.

First, the video games analyzed in *Brown* are distinguishable based on the video games themselves. The Court stated that video games are not valueless *per se*, but rather they provide rich opportunities for young people to engage in various situations that can create valuable learning experiences.<sup>90</sup> Specifically, the Court compared video games to other materials protected by the First Amendment and explained that “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).”<sup>91</sup>

In contrast, the advertisements of teen magazines do not have role-playing experience associated with them. There is no “virtual world” that the child can learn from. Rather than virtual situations designed to encourage children to learn to make serious life choices, these advertisements lead vulnerable teen girls to make harmful choices.<sup>92</sup> After viewing these advertisements, which in some cases involve extensive airbrushing, certain young women begin mimicking behavior<sup>93</sup> that is not only dangerous, but also illusory. No learning experience can be gained from engaging in unhealthy and dangerous behavior. More importantly, this behavior is harmful, and even fatal, for young girls.<sup>94</sup>

Second, unlike the video game industry, which has already designed a rating system to inform consumers of the contents of the games,<sup>95</sup> the advertisements in teen magazines have no such disclaimer or information to inform the teen readers of the

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90. *Id.* at 2733.

91. *Id.*

92. See discussion *supra* Section II.

93. See discussion *supra* Section II.

94. See discussion *supra* Section II.

95. *Brown v. Entm’t Merchs. Ass’n et al.*, 131 S. Ct. 2729, 2740 – 41 (2011).

dangers associated with being unnaturally thin. These advertisements also do not inform teens that obtaining this level of thinness may only be made possible with the aid of technology. Therefore, the decision in *Brown* will not preclude the Court from declaring advertisements in teen magazines outside the protections of the First Amendment.

## VI. ADVERTISEMENTS IN TEEN MAGAZINES ARE FALSE AND MISLEADING COMMERCIAL SPEECH

Thus far this article has examined the justifications behind the Court's decisions to hold obscenity and fighting words unprotected. It has analogized those justifications to teen magazine advertisements. However, it may be determined that a new category of unprotected speech is undesirable. In that case, the advertisements contained in teen magazines may likely still be regulated as commercial speech that is false or misleading.

Over the years, the Supreme Court has examined the relationship between advertising and the First Amendment. It has determined that commercial speech is constitutionally protected, yet afforded less protection than other forms of speech.<sup>96</sup> In general, commercial speech may be banned when it is actually misleading or deceptive.<sup>97</sup> In deciding whether the speech is deceptive, the Court takes into account the audience's ability to ascertain truth about the advertised products.<sup>98</sup>

There are at least two distinct ways in which advertisements contained in teen magazines are false and misleading. The first is the magazine's employment of deceptive weight loss techniques. "A content analysis of weight-loss advertising in 2001 found that more than half of all advertising

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96. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (citing *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447, 456 – 57 (1978)).

97. *Id.* at 563 (stating that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.").

98. *Ass'n Nat'l Advertisers v. Lungren*, 44 F.3d 726, 731 – 32 (9th Cir. 1994).

for weight-loss products made use of false, unsubstantiated claims.”<sup>99</sup>

The second false and misleading component of these advertisements is that they contain images that are digitally altered to make the person in the photograph “ideal.” The American Medical Association (AMA) announced a policy in which it encourages “advertising associations to work with public and private sector organizations concerned with child and adolescent health to develop guidelines for advertisements, especially those appearing in teen-oriented publications.”<sup>100</sup> These guidelines would “discourage the altering of photographs in a manner that could promote unrealistic expectations of appropriate body image.”<sup>101</sup> According to the AMA, new policies in advertising are needed because “[a]dvertisers commonly alter photographs to enhance the appearance of models’ bodies, and such alterations can contribute to unrealistic expectations of appropriate body image – especially among impressionable children and adolescents.”<sup>102</sup>

Digitally altered photographs may produce negative effects when directed towards an audience that is vulnerable to manipulation. The cognitive effect of digitally altered photographs may be why forty-three percent of students are attempting weight reduction.<sup>103</sup> Digitally altered photos could explain why “[o]ver half of young women report that they would prefer to be hit by a truck than be fat, and two-thirds [report that they] would rather be mean or stupid.”<sup>104</sup> When

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99. Renee Hobbs et al., *How Adolescent Girls Interpret Weight-Loss Advertising*, 21 HEALTH EDUC. RES. 719, 720 (2006) (citing Richard L. Cleland et al., *Weight Loss Advertising: An Analysis of Current Trends*, FED. TRADE COMMISSION STAFF REP. (Sept. 2002), <http://www.ftc.gov/bcp/reports/weightloss.pdf>).

100. AM. MED. ASS’N, *supra* note 78.

101. *Id.*

102. *Id.*

103. Jo Anne Grunbaum et al., *Youth Risk Behavior Surveillance—United States, 2003*, MMWR SURVEILLANCE SUMMARIES, May 21, 2004, at 1, 25, 89, available at <http://www.cdc.gov/mmwr/PDF/ss/ss5302.pdf>.

104. Rhode, *supra* note 41, at 1040 (citing MARGO MAINE, BODY WARS: MAKING PEACE WITH WOMEN’S BODIES 19 (2000) and NAOMI WOLF, THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN 185 – 86 (1991)).

teenagers attempt weight reduction, their behavior may lead to eating disorders, and eating disorders carry great risks.

Creators of teen magazines may argue that their magazines include articles that try to make young girls realize that appearance is not the most important issue in life. For example, in a 2006 issue of *Cosmo Girl*, an article called attempted to make girls realize that if they become obsessed with their appearance, they may be missing out on the "more important things."<sup>105</sup> However, the article's lofty purpose was undermined by the fact that advertisements both preceding and following the article featured size two celebrities, such as Jennifer Aniston, and the Olsen twins, one of whom has already suffered an eating disorder.<sup>106</sup> Therefore, even if there can be an argument made for including articles in teen magazines that try to promote healthy behavior in women, these articles are drastically undercut by the advertisements containing unnaturally thin, digitally altered photos of celebrities and models.

People, and teen girls, are not aware that the ambitious claims and photographs in magazines are false. In a study, only seventeen percent of girls realized that the claims made by magazine advertisements were false.<sup>107</sup> Proponents of digitally altering photos argue that it is widely known that digital alterations are used in photography.<sup>108</sup> However, studies show that people are generally unaware of models' artificiality.<sup>109</sup> Moreover, it is questionable whether *teen* viewers possess this knowledge; and further, whether teen girls are mature enough to differentiate between real and altered images.<sup>110</sup>

The speech within these ads is false and misleading and is presented to a vulnerable audience. As such, these ads should

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105. DURHAM, *supra* note 26, at 98 (citing Jessica Weiner, *Global Body Image Survey*, COSMO GIRL, Feb. 2006, at 126).

106. *Id.*

107. Renee Hobbs et al., *How Adolescent Girls Interpret Weight-Loss Advertising*, 21 HEALTH EDUC. RES. 719, 723 (2006).

108. *Id.* at 719 – 21.

109. NAT'L EATING DISORDERS ASS'N, *supra* note 36.

110. Hobbs et al., *supra* note 99, at 726.

not be afforded the protections of the First Amendment.

## VII. CONCLUSION

Undoubtedly, the advertisements in teen magazines are contributing to the growing occurrence of eating disorders in teen girls. This article proposes a number of ways to prohibit or regulate these advertisements.

First, the justifications used to ban obscene speech and fighting words may be employed to ban teen magazine advertisements. Thus, the Court could find these advertisements to be a new category of unprotected speech.

If, as discussed, it would be undesirable to create a new category of unprotected speech, the advertisements in teen magazines would still fall outside the protections of the First Amendment. Presented in the form that they are today, these advertisements fall within the criteria of false and misleading commercial speech. Thus, they are unprotected.

This article has provided the legal justifications to regulate advertisements in teen magazines. These regulations should be implemented so that young girls are no longer encouraged to pursue harmful behaviors, which have dire consequences to their health. The welfare of millions of American girls is at stake and; therefore, change is essential.